

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

Communications Assistance for Law
Enforcement Act

CC Docket No. 97-213

REPLY COMMENTS

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December 8, 2000

BellSouth Reply Comments
CC Docket No. 97-213
December 8, 2000
Doc No. 133473

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EXECUTIVE SUMMARY

Despite the very creative and liberal interpretations of the Communications Assistance for Law Enforcement Act (“CALEA”) set forth by the Department of Justice/Federal Bureau of Investigation (“DOJ/FBI”), the plain language of the statute, its legislative history, and the evidence in the record could not be more clear. First, the J-Standard is not deficient. Second, the four “punch list” capabilities are not covered by the term “call-identifying information.” Third, even if the four “punch list” items fell within the scope of “call-identifying information,” carriers would not be required to provide this information because it is not “reasonably available.” Finally, there are less costly, yet equally effective, alternatives for complying with the assistance capability requirements of CALEA than the methods proposed by the DOJ/FBI.

BellSouth therefore urges the Commission not to give credence to the proposals and assertions offered by the DOJ/FBI. It is obvious that law enforcement’s goal is to obtain the broadest array of information possible with little, if any, regard to the express mandates of CALEA. Rather than comply with the letter and spirit of CALEA, the DOJ/FBI continues its efforts to circumvent CALEA by suggesting an overly expansive definition of “call-identifying information,” unjustly dismissing viable and “cost-effective” alternatives to the four “punch list” features, and conveniently ignoring certain CALEA implementation costs. To bring CALEA back to its original purpose and ensure the proper balance among law enforcement needs, consumer privacy, technological innovation, and costs, the Commission should not modify the current requirements of Section 103 to include the four “punch list” capabilities. Rather, the Commission should uphold the existing J-Standard as a “safe harbor” for satisfying CALEA’s assistance capability obligations.

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REPLY COMMENTS

BellSouth Corporation, by counsel and on behalf of itself and its affiliated companies (“BellSouth”),¹ respectfully submits these reply comments in the above-captioned proceeding.² As the record convincingly demonstrates, requiring the implementation of the four “punch list” capabilities will impermissibly exceed the scope of the Communications Assistance for Law Enforcement Act (“CALEA”), conflict with established electronic surveillance law, infringe upon the privacy and security of communications, and impose significant and unnecessary costs upon carriers and ratepayers in direct violation of CALEA. Accordingly, BellSouth urges the Commission to uphold the existing industry standard (J-STD-025) as a safe harbor for complying with the assistance capability requirements of Section 103 of CALEA without any further modifications.

¹ BellSouth Corporation is a publicly traded Georgia corporation that holds the stock of companies that offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and provide mobile communications and other network services world-wide.

² *Commission Seeks Comments To Update the Record in the CALEA Technical Capabilities Proceeding*, CC Docket No. 97-213, *Public Notice*, DA 00-2342 (rel. Oct. 17, 2000) (“*Public Notice*”).

I. INTRODUCTION

Despite the very creative and liberal interpretations of CALEA set forth by the Department of Justice/Federal Bureau of Investigation (“DOJ/FBI”), the plain language of the statute, its legislative history, and evidence in the record could not be more clear. First, the J-Standard is not deficient. Second, the four “punch list” capabilities are not covered by the term “call-identifying information.” Third, even if the four “punch list” items fell within the scope of “call-identifying information,” carriers would not be required to provide this information because it is not “reasonably available.” Finally, there are less costly, yet equally effective, alternatives for complying with the assistance capability requirements of CALEA than the methods proposed by the DOJ/FBI.

As demonstrated more fully herein, fallacies and erroneous conclusions permeate the DOJ/FBI comments. One of the DOJ/FBI’s biggest misconceptions is that CALEA was enacted for the sole benefit of law enforcement. Contrary to this belief, the purpose of CALEA is three-fold: (1) “to preserve the government’s ability, pursuant to court order or other lawful authorization, to intercept communications involving advanced technologies . . .;” (2) to “protect[] the privacy of communications;” and (3) to avoid “impeding the introduction of new technologies, features, and services.”³ Thus, the needs of law enforcement do not automatically trump these other equally important Congressional objectives. Rather, CALEA requires a careful balancing of these goals, and, as the record demonstrates, the J-Standard achieves such a balance.

Although CALEA clarifies a carrier’s obligation to design its network systems so as not to impede electronic surveillance, there is no requirement that a carrier provide network

³ H.R. Rep. No. 103-827, 103d Cong., 2d Sess., Pt. 1 at 9 (1994) (“House Report”).

intelligence or signaling information that law enforcement has no statutory authority to receive. Moreover, CALEA and its legislative history strictly prohibit law enforcement from dictating how a carrier must design its network in order to comply with CALEA. The statute expressly states that law enforcement agencies are not permitted “to require any specific design of equipment, facilities, services, features or system configurations to be adopted by any provider” of telecommunications service.⁴ CALEA “leaves it to the carrier to decide how to comply.”⁵ Thus, the Commission should not adopt the four “punch list” items. To do otherwise would allow the DOJ/FBI to micromanage carrier network design and development in contravention of CALEA.

The Commission also should preclude law enforcement from using CALEA as a tool to assist in the creation of evidence. The DOJ/FBI’s demand for the four “punch list” features reflects law enforcement’s desire to obtain information from carriers in a form that minimizes the work required to gather evidence or demonstrate the integrity of such evidence. Essentially, the DOJ/FBI wants these “punch list” capabilities to reduce the amount of work that law enforcement must undertake in criminal investigations and transfer that burden to carriers. CALEA, however, was not adopted to require carriers to do law enforcement’s job. Rather, CALEA obligates carriers to cooperate with law enforcement and ensure that their networks are capable of providing law enforcement with “call-identifying information.”

⁴ 47 U.S.C. § 1002(b)(1). The legislative history expressly reiterates this prohibition against law enforcement dictating carrier network design. House Report at 23 (“First, law enforcement agencies are not permitted to require the specific design of systems or features, nor prohibit adoption of any such design, by wire or electronic communication service providers [sic] or equipment manufacturers.”).

⁵ House Report at 23.

The DOJ/FBI must also be reminded that the role of establishing law belongs solely to Congress and is not shared by law enforcement. Rather than complying with the plain language of the statute, the DOJ/FBI is seeking to unilaterally re-write CALEA. For example, the DOJ/FBI suggests that the Commission “adopt a presumption that ‘call-identifying information’ includes information that law enforcement has traditionally been able to receive through authorized electronic surveillance in the POTS environment – in particular, information that has been available when law enforcement conducts pen register and trap-and-trace surveillance.”⁶ The Commission must necessarily reject this proposal.

CALEA does not authorize the Commission, or any other body, to establish such a presumption. Moreover, nothing in the legislative history discusses the creation of a presumption entitling law enforcement to receive all information that it has received in the past. Had Congress intended the adoption of such a presumption, it would have expressly stated so in the statute.

Moreover, the DOJ/FBI’s “presumption” proposal is based on faulty logic. It is well known that law enforcement routinely receives information beyond that to which it is legally entitled under pen register orders because of technical limitations in the ability to filter information. For example, in today’s environment, law enforcement can order a one-way call-content channel and install the necessary equipment to extract all post-cut-through digits (including “call content”). If the legal authorization is limited to a pen register order, the government is supposed to take measures to minimize the degree of intrusion and is prohibited

⁶ Remand Comments of DOJ/FBI at 10; *see also* Remand Comments of DOJ/FBI at 11 (“But where CALEA’s language and legislative history neither compel or foreclose treating particular information as ‘call-identifying information,’ the traditional availability of the information to law enforcement should be given substantial weight.”).

from using any unauthorized information as evidence. Despite this “scout’s honor” safeguard, there is nothing to preclude law enforcement from using “call content” information in other intrusive ways besides introducing it as evidence in court. Obtaining a Title III warrant is a simple and lawful solution to this problem. A Title III order entitles law enforcement to receive and use as evidence all post-cut-through digits delivered (both “call content” and “call-identifying information”).

Thus, the Commission must necessarily reject the DOJ/FBI’s presumption proposal. It would be inappropriate to allow the DOJ/FBI to rely on the technical limitations that currently constrain carriers’ ability to filter information as a basis to support its proposal. If the Commission were to adopt such a presumption, it would effectively be codifying unlawful electronic surveillance in direct violation of CALEA. As the legislative history explicitly states, CALEA “further protects privacy by requiring the systems of telecommunications carriers to protect communications not authorized to be intercepted and by *restricting the ability of law enforcement to use pen register devices for tracking purposes or for obtaining transactional information.*”⁷ Thus, Congress could not have been more clear on this issue – law enforcement is not authorized to receive information that constitutes “call content” under only a pen register order.

BellSouth also urges the Commission not to be enticed by the DOJ/FBI’s creative interpretations of the recent D.C. Circuit Court of Appeals decision. The DOJ/FBI states that, “[i]n vacating the Commission’s decision regarding the four punch list capabilities, the Court of Appeals did not conclude that the decision was inconsistent with the terms of CALEA.”⁸

⁷ House Report at 10 (emphasis added).

⁸ Remand Comments of DOJ/FBI at 5 (emphasis in original).

Although this statement is technically true, the DOJ/FBI conveniently omits the fact that the court did not arrive at such a conclusion because it did not have to proceed to that phase in its analysis. The court appropriately rejected the Commission's decision to modify the J-Standard to include the "punch list" items because the *Third Report and Order*⁹ reflected "a lack of reasoned decisionmaking."¹⁰ Once the court rejected the Commission's rules on this basis, it was unnecessary to decide the merits of the case. Notwithstanding this fact, further review by the court is certainly an available option should the need arise.

In sum, BellSouth urges the Commission not to be fooled by the DOJ/FBI's attempts to tailor CALEA to suit its own needs at the expense of ratepayers and the industry. The Commission is bound by law to implement CALEA "narrowly"¹¹ and in a "cost-effective"¹² manner. If the Commission adds the four "punch list" items to the J-Standard and adopts the additional proposals set forth by the DOJ/FBI, it will do so in direct violation of CALEA.

II. THE RECORD PROVES THAT THE EXISTING INDUSTRY STANDARD IS NOT DEFICIENT AND FULLY COMPLIES WITH THE ASSISTANCE CAPABILITY REQUIREMENTS OF CALEA.

The DOJ/FBI is the only party in this proceeding to determine that the J-Standard's definition of "call-identifying information" and its sub-parts is deficient.¹³ Neither the D.C. Circuit nor the Commission found the J-Standard's definition of "call-identifying information" to

⁹ *Communications Assistance for Law Enforcement Act*, CC Docket No. 97-213, *Third Report and Order*, 14 FCC Rcd 16794 (1999) ("*Third Report and Order*").

¹⁰ *United States Telecom Association, et al. v. Federal Communications Commission, et al.*, 227 F.3d 450, 460 (D.C. Cir. 2000) ("*USTA v. FCC*").

¹¹ House Report at 23.

¹² 47 U.S.C. §§ 1006(b)(1), 1006(b)(3).

¹³ See Remand Comments of DOJ/FBI at 7.

be inconsistent with CALEA. This result should not come as a surprise. As the record overwhelmingly demonstrates, the J-Standard's use of the term "call-identifying information" faithfully tracks the language of CALEA and therefore should be upheld.

In order to ensure that the Commission affords proper deference to the industry-developed J-Standard as mandated by CALEA, Congress authorized the Commission to modify the standard under a limited set of circumstances – a finding that the standard is deficient.¹⁴ No party – including the Commission – has carried this burden. As the D.C. Circuit correctly points out, "[a]lthough the Commission used its rulemaking power to alter the J-Standard, *it identified no deficiencies in the Standard's definitions of the terms 'origin,' 'destination,' 'direction,' and 'termination,'* which describe 'call-identifying information' in terms of telephone numbers."¹⁵

The Commission cannot now re-trace its steps and conclude that the J-Standard's definition of "call-identifying information" is deficient in the absence of clear evidence. As the D.C. Circuit concluded, "[w]ere we to allow the Commission to modify the J-Standard without first identifying its deficiencies, we would weaken the major role Congress obviously expected industry to play in formulating CALEA standards."¹⁶ Since the evidence in the record does not support a finding of deficiency, the Commission cannot carry this burden of proof. As AT&T points out:

J-STD-025 reflects the combined technical opinions and efforts of dozens of the world's leading systems engineers from a wide variety of carriers and manufacturers. As such, the definitions contained in the J-Standard reflect current industry practice and the industry "know-how" that Congress wanted to explicitly

¹⁴ 47 U.S.C. § 1006(b).

¹⁵ *USTA v. FCC*, 227 F.2d at 460-461 (emphasis added).

¹⁶ *Id.* at 461.

incorporate in CALEA standards and wanted overruled only when a clear showing of deficiency has been made.¹⁷

No such showing has been – nor can be – made.

The infirmities contained in the *Third Report and Order* cannot simply be fixed by providing the Commission with a menu of “reasoned explanations”¹⁸ from which to choose. The DOJ/FBI erroneously contends that “[a]ll that is required to support the vacated provisions of the original rule is for the Commission to provide the kind of reasoned explanation that the D.C. Circuit found to be lacking in the Third Report and Order.”¹⁹ This description of the task at hand significantly oversimplifies and trivializes the Commission’s obligations under CALEA.

The Commission is bound by the four corners of the statute and its legislative history. CALEA does not vest the Commission with unbridled discretion to adopt the overly expansive requirements sought by law enforcement. To the contrary, CALEA directs the Commission to implement the statute as Congress intended – “narrowly”²⁰ and in a “cost-effective”²¹ manner.

In order to comply with this directive, the Commission should dismiss the DOJ/FBI’s self-serving attack on the J-Standard’s definition of “call-identifying information.” This objection is an attempt by the government to eliminate the safe harbor standard altogether. The DOJ/FBI claims that the “the Commission is under no obligation to announce an all-encompassing definition of ‘call-identifying information’ that goes beyond the confines of this proceeding to address and resolve all potential applications of the statutory terms.”²² The

¹⁷ AT&T Comments at 4-5.

¹⁸ Remand Comments of DOJ/FBI at 8.

¹⁹ *Id.*

²⁰ House Report at 23.

²¹ 47 U.S.C. §§ 1006(b)(1), 1006(b)(3).

²² Remand Comments of DOJ/FBI at 17.

DOJ/FBI further asserts that the “Commission is free to construe ‘call-identifying information’ with reference to the specific capabilities now at issue, leaving questions about the scope of the term in other contexts to be resolved in the future, if and when they arise.”²³ Based on these suggestions, it is clear that the DOJ/FBI would prefer to replace CALEA’s straightforward definition of “call-identifying information” with an imprecise, unrestricted definition that would no doubt be inconsistent with CALEA.

CALEA, however, does not authorize the Commission to define freely the term “call-identifying information” or to adopt a vacillating definition that changes with the weather. Congress has spoken on this issue by establishing an explicit definition of “call-identifying information.”²⁴ Neither the Commission nor the DOJ/FBI has the power to adopt a different meaning. Thus, the Commission must reject the DOJ/FBI’s call for a “case-by-case” definition. This suggestion is nothing more than an obvious attempt to gain unfettered access to the broadest array of information possible, despite the limitations prescribed by CALEA, and to burden carriers with “gold-plated” assistance capability requirements.

III. THERE IS OVERWHELMING EVIDENCE IN THE RECORD THAT “CALL-IDENTIFYING INFORMATION” UNDER CALEA IS LIMITED TO NUMBERS DIALED OR TRANSMITTED FOR THE PURPOSE OF ROUTING CALLS.

The DOJ/FBI goes to great pains to dissect CALEA’s definition of the term “call-identifying information” in a light most favorable to law enforcement.²⁵ Despite these creative

²³ Remand Comments of DOJ/FBI at 17.

²⁴ CALEA defines “call-identifying information” as “dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier.” 47 U.S.C. § 1001(2).

²⁵ See Remand Comments of DOJ/FBI at 13-18.

interpretations, the DOJ/FBI fails to cure the deficiencies in the Commission's *Third Report and Order*, which the D.C. Circuit found to be void of reasoned decisionmaking. Instead of continuing to play fast and loose with the plain language of CALEA to suit its needs, BellSouth recommends that the DOJ/FBI adhere to both the letter and the spirit of the statute.

As the record convincingly demonstrates, the term "call-identifying information" is confined to the numbers dialed or transmitted for the purpose of routing a call.²⁶ The plain language of CALEA, its legislative history, and established electronic surveillance law all support that conclusion. Congress defined the term "call-identifying information" narrowly to include only number information that has traditionally been provided pursuant to court orders or other lawful authorizations for pen registers and trap and trace devices. Congress did not extend the definition to include other carrier network messages, tones, or signals.²⁷

²⁶ See, e.g., AT&T Comments at 5; BellSouth Comments at 4-7; Cingular Comments at 2; Center for Democracy and Technology at 4; PCIA Comments at 6; USTA Comments at 7-11.

²⁷ The legislative history leaves little doubt that Congress intended to limit the meaning of "call-identifying information" to telephone numbers. As Congress explained:

... For voice communications, this [call-identifying] information is typically the electronic pulses, audio tones, or signaling messages that *identify the numbers dialed or otherwise transmitted for the purpose of routing calls* through the telecommunications carrier's network. In pen register investigations, these pulses, tones, or messages *identify the numbers dialed* from the facility that is the subject of the court order or other lawful authorization. In trap and trace investigations, these are the incoming pulses, tones, or messages which *identify the originating number* of the facility from which the call was placed and which are captured when directed to the facility that is the subject of the court order or authorization. *Other dialing tones that may be generated by the sender that are used to signal customer premises equipment of the recipient are not to be treated as call-identifying information.*

House Report at 21 (emphasis added).

The DOJ/FBI tries to undermine the J-Standard's definition of "call-identifying information" by claiming that "the J-Standard's interpretation of 'direction' and 'termination' makes those terms largely redundant with 'origin' and 'destination.'"²⁸ This assertion is nothing more than a smokescreen. The J-Standard's definitions of "call-identifying information" and its constituent terms comport fully with the plain language of CALEA and the accompanying legislative history.

Moreover, contrary to the DOJ/FBI's assertions, the J-Standard provides a separate and distinct definition for each of the terms included in CALEA's definition of "call-identifying information." For example, the J-Standard defines "destination" as the number of the party to which a call is being made (*e.g.*, the called party). "Direction" is the number to which a call is re-directed or the number from which it came, either incoming or outgoing (*e.g.*, redirected-to party or redirected-from party). "Origin" is the number of the party initiating a call (*e.g.*, calling party). "Termination" is the number of the party ultimately receiving a call (*e.g.*, answering party).²⁹ Thus, each term is uniquely identified and there is no redundancy, except in the eyes of the DOJ/FBI, for whom a hazy definition would permit unrestricted access to the other network tones and signals it seeks – which are clearly beyond the scope of "call-identifying information."

The J-Standard's interpretation of "call-identifying information" not only tracks the statutory language of CALEA, but also is faithful to the pen register and trap and trace provisions of the Electronic Communications Privacy Act ("ECPA").³⁰ A pen register is defined as a device that captures "electronic or other impulses which identify the *numbers dialed or*

²⁸ Remand Comments of DOJ/FBI at 29.

²⁹ J-Standard at 5.

³⁰ 18 U.S.C. § 3121 *et seq.*

otherwise transmitted.” Trap and trace devices capture “electronic or other impulses which identify the *originating number* of an instrument or device from which a wire or electronic communication was transmitted.”³¹ It is illogical to think that Congress would require carriers to provide a capability under CALEA that conflicts with the authority set forth in established electronic surveillance law. Clearly, Congress intended to limit the term “call-identifying information” to telephone numbers, and the Commission cannot unlawfully expand that definition by substituting its own judgment for that of Congress.

Thus, the evidence in this proceeding convincingly demonstrates that the core J-Standard meets the Section 103 assistance capability requirements and therefore should not be modified. The industry standard properly incorporates CALEA terms and concepts, including “call-identifying information.” Accordingly, the Commission should not add the four “punch list” capabilities to the J-Standard. These “punch list” features are beyond the scope of CALEA’s assistance capability requirements because, as demonstrated below, the information provided by these capabilities does not constitute “call identifying information.”

IV. NOT ONLY DO THE FOUR “PUNCH LIST” CAPABILITIES FALL OUTSIDE THE SCOPE OF CALEA BUT LESS COSTLY ALTERNATIVES ARE READILY AVAILABLE.

As CALEA mandates and the D.C. Circuit properly recognized, in order to modify the J-Standard, the Commission must demonstrate that the standard is deficient.³² If the Commission carries that burden (which it cannot), it next must demonstrate that the four “punch list” capabilities: (1) fall within the scope of “call-identifying information;” (2) result in the delivery

³¹ 18 U.S.C. §§ 3127(3)-(4) (emphasis added).

³² 47 U.S.C. § 1006(b); *USTA v. FCC*, 227 F.3d at 461.

of information that is “reasonably available;” and (3) are “cost-effective.” The Commission cannot satisfy this burden because the law will not allow it. First, the four “punch list” features do not constitute “call-identifying information” as defined by CALEA and the legislative history. Second, even if the four “punch list” items were covered by the term “call-identifying information,” the information sought would not be “reasonably available” under CALEA. Third, there are less costly and equally effective means of satisfying the assistance capability requirements of Section 103 than adoption of the four “punch list” items.

The DOJ/FBI, however, blatantly ignores the available alternatives. The DOJ/FBI repeatedly claims that the “commenters have thus far failed to identify any alternative measures that cure the deficiencies in the J-Standard by less expensive means”³³ As the record clearly demonstrates, the DOJ/FBI is wrong. First, the core J-Standard, as written, is a reasonable means of satisfying the assistance capability requirements of Section 103. Second, as BellSouth and others repeatedly have shown, the J-Standard is a “cost-effective” and efficient alternative.³⁴ Thus, the Commission should find that the J-Standard is a “safe harbor” for complying with CALEA’s assistance capability obligations.

1. Dialed Digit Extraction

The DOJ/FBI describes dialed digit extraction as “by far the most important of the four punch list capabilities vacated by the Court of Appeals.”³⁵ In addition to being at the top of the DOJ/FBI’s wish list, this capability also poses the greatest risk to consumer privacy.

³³ Remand Comments of DOJ/FBI at 32; *see also* Remand Comments of DOJ/FBI at 46.

³⁴ *See, e.g.*, BellSouth Comments at 12-20; Cingular Comments at 8; PCIA Comments at 10; USTA Comments at 12-14.

³⁵ Remand Comments of DOJ/FBI at 18.

Notwithstanding this significance to law enforcement, a stated desire for a “punch list” feature does not automatically make it an assistance capability required by CALEA, as argued earnestly by the DOJ/FBI. The standard for determining whether CALEA mandates a particular assistance capability is whether the information sought is “call-identifying information” that is “reasonably available” and can be obtained in a “cost-effective” manner – not its presumed importance to law enforcement.

All commenters, including the DOJ/FBI, recognize that “post-cut-through digits that are dialed for transactional purposes, such as digits that are dialed to conduct automated banking transaction, do not constitute ‘call-identifying information.’”³⁶ Nonetheless, the DOJ/FBI continues to claim that CALEA requires the delivery of these transactional digits (which constitute “call content”) as “call-identifying information” under a pen register order. There is absolutely no statutory basis for this conclusion. The legislative history explicitly states that CALEA is intended to “protect[] privacy by requiring the systems of telecommunications carriers to protect communications not authorized to be intercepted and by restricting the ability of law enforcement to use pen register devices . . . for obtaining transaction information.”³⁷ In fact, CALEA “increases the protection for transactional data”³⁸ Thus, Congress could not have been more clear that law enforcement is not entitled to receive this type of transactional information as “call-identifying information” under a pen register order.

³⁶ Remand Comments of DOJ/FBI at 19; *see, e.g.*, AT&T Comments at 9; BellSouth Comments at 10-11; Cingular Comments at 6; CTIA Comments at 13; Center for Democracy and Technology Comments at 4-5; PCIA Comments at 8; USTA Comments at 9-10.

³⁷ House Report at 10.

³⁸ *Id.*

Moreover, the Commission should not be persuaded by the DOJ/FBI's faulty logic. For example, the DOJ/FBI asserts that "the fact that post-cut-through transactional dialing is not 'call-identifying information' is irrelevant to the question of whether post-cut-through telephone numbers – digits that identify the destination of the calling party's communication – are 'call-identifying information.'"³⁹ This analysis misses the point. As mentioned above, no party disputes that post-cut-through digits identifying telephone numbers for call routing purposes constitute "call-identifying information" to a carrier.

The critical issue is that existing technology does not allow carriers to differentiate between post-cut-through digits that are, in fact, "call identifying information" to a carrier and those that constitute "call content." Even the DOJ/FBI concedes that it is "not aware of any currently available technology that permits an originating carrier to limit dialed digit extraction to digits that are dialed for call routing purposes."⁴⁰ If the Commission requires carriers to implement dialed digit extraction, all digits (including those that fall outside the scope of its "call-identifying information") would have to be delivered. Such a result is lawful only under a Title III authorization. Despite the DOJ/FBI's numerous machinations, it has not identified any legal authority that would permit the government to access all post-cut-through digits (including those that constitute "call content") under a pen register order. It has failed to do so precisely because CALEA, as well as the pen register and trap and trace statutes, prohibit such access.

The DOJ/FBI suggests that the Commission modify its rules in anticipation of the future development of such technology.⁴¹ The Commission should reject this proposal as premature.

³⁹ Remand Comments of DOJ/FBI at 20 (emphasis in original).

⁴⁰ Remand Comments of DOJ/FBI at 20.

⁴¹ See Remand Comments of DOJ/FBI at 52.

CALEA requires carriers to “isolat[e]” “call-identifying information” for delivery to law enforcement.⁴² However, with respect to post-cut-through digits, current technology does not permit the complete isolation of “call-identifying information” from “call content.” It would be unlawful to require the delivery of unauthorized (transactional) information together with authorized (call routing) information under a pen register order in the absence of available technology to filter the information. Therefore, the Commission should wait until the technology is available to address this issue. Until that time, law enforcement’s needs can be met by relying on Title III to gain access to post-cut-through digits that constitute both “call-identifying information” and “call content.”

As demonstrated in Section I, law enforcement’s prior access to certain information neither proves that a specific capability falls within the scope of CALEA nor trumps existing electronic surveillance law. There is nothing in CALEA or its legislative history that authorizes law enforcement to receive post-cut-through digits that constitute “call content” under a pen register order. Therefore, law enforcement must have a Title III order to obtain any such post-cut-through digits.⁴³ Requiring post-cut-through digits in the absence of a Title III order is not

⁴² 47 U.S.C. § 1002(a)(2).

⁴³ The DOJ/FBI suggests that any “carrier that believes that dialed digit extraction is beyond the scope of the authority conferred by the pen register statute may seek relief from a pen register order, and if the court concludes (contrary to the government’s view) that the pen register statute does not provide authority for the delivery of post-cut-through digits, the carrier would have the ability to turn off dialed digit extraction before executing the pen register order.” Remand Comments of DOJ/FBI at 51. The Commission should reject this proposal. A pen register order cannot legitimize the delivery of post-cut-through digits that constitute “call content” under any circumstances. Title III authorization is required. If a toggle switch for dialed digit extraction becomes available, the burden of proof should be on the government – not the carrier – to prove that the toggle switch should be activated to allow the delivery of all post-cut-through digits. The evidentiary burden associated with electronic surveillance authorization always has been – and should continue to be – placed on law enforcement.

only inconsistent with CALEA but also places carriers in a precarious position with respect to customer privacy.

The DOJ/FBI's attack on the alternatives to dialed digit extraction is without merit. In its comments, BellSouth proposed two "cost-effective" means of obtaining post-cut-through digits.⁴⁴ The first alternative would require law enforcement to obtain a Title III order to serve upon the originating carrier thereby entitling the government to access lawfully all post-cut-through digits – both "call content" and "call-identifying information." Under the second alternative, since post-cut-through digits qualify as "call-identifying information" from the perspective of the long-distance carrier, law enforcement could serve the long-distance carrier with a lawful pen register authorization in order to obtain those digits constituting "call-identifying information."

The DOJ/FBI summarily dismisses these alternatives without sufficient justification, because it apparently does not wish to take an extra and necessary step to conduct proper and lawful electronic surveillance. Consequently, its objections must fail. Law enforcement inconvenience is not dispositive. As BellSouth pointed out in its comments, although these alternatives might be less convenient for the government, the legislative history of CALEA was "not intended to guarantee 'one-stop shopping' for law enforcement."⁴⁵ Requiring law enforcement to obtain a Title III warrant for all post-cut-through digits, though potentially less convenient, certainly is more consistent with CALEA's mandate to protect the privacy of communications than was the solution adopted in the *Third Report and Order*. Similarly,

⁴⁴ See BellSouth Comments at 11-13.

⁴⁵ House Report at 22.

requiring law enforcement to identify the underlying long-distance carrier and serve that carrier with a pen register order will protect privacy as mandated by CALEA.

The J-Standard is designed to accommodate the two alternatives described above. Therefore, the J-Standard adequately addresses the needs of law enforcement, while simultaneously minimizing costs. J-STD-025 enables law enforcement to obtain “call-identifying information” – digits used to route calls – over a data channel. If, however, the government seeks access to digits that constitute both “call content” and “call-identifying information,” the J-Standard permits law enforcement to order a call content (or voice) channel and receive such information pursuant to a lawful court order. Under this arrangement, the government would order a one-way call content channel and install, at its own expense, the equipment necessary to extract the post-cut-through digits.

Thus, the record overwhelmingly demonstrates that there are economical alternatives to dialed digit extraction, and the Commission is obligated to consider the merits of each of these alternatives. If the Commission implements CALEA as Congress intended, it will properly conclude that the dialed digit extraction feature is not required.

2. Party Hold, Party Join, and Party Drop Messages

There is significant evidence in the record demonstrating that the messages generated by this capability are clearly not “numbers” and therefore do not constitute “call-identifying information.”⁴⁶ While information leading to the identity of third parties who join or drop from a target’s call may be useful to law enforcement, it is not “call-identifying information” because it does not relate to the “origin, destination, termination, or direction” of a call and is not used for

⁴⁶ See, e.g., BellSouth Comments at 14; Cingular Comments at 8-9; CTIA Comments at 16; Center for Democracy and Technology Comments at 9; USTA Comments at 7.

call routing purposes. Thus, the information provided by this capability is beyond the scope of CALEA and therefore is not required.

Moreover, contrary to the erroneous claims of the DOJ/FBI, there are alternatives to this “punch list” item. In most cases, it will be apparent to law enforcement which parties are participating on a call based on the messages already provided pursuant to the core J-Standard. Under the J-Standard, a multi-party call is identified by the phone number of each participant. An Origination message informs law enforcement that the subject has placed an outgoing call and identifies the destination telephone number. A Termination message informs law enforcement that the subject has an incoming call and identifies the calling telephone number. An Answer message identifies the number where the call is answered in those cases when the termination number is not the normal destination (*e.g.*, call pickup or call forwarding). A Change message reports any changes in call identities. Thus, the J-Standard already provides law enforcement with access to the information requested under this “punch list” item. Because of this redundancy, there is no need to require carriers also to implement the party/hold/drop feature.

3. Subject-Initiated Dialing and Signaling

The DOJ/FBI’s justification for access to subject-initiated dialing and signaling is that it has always had access to this information in the past.⁴⁷ Again, this argument must necessarily fail because there is no statutory basis to support it. Just because the limitations of technology in the past permitted law enforcement to access certain network signals and tones does not mean that they should continue to have such network information under CALEA. As the record

⁴⁷ Remand Comments of DOJ/FBI at 23-24.

demonstrates, the information provided under this capability does not constitute “call-identifying information” under CALEA and therefore is not required.⁴⁸

The solution provided under the J-Standard provides law enforcement with information similar to that sought under this capability. Under J-STD-025, carriers report the resultant status change that occurs in the call rather than the stimulus itself. For example, if (1) the subject is on an existing call, (2) subscribes to three-way calling, (3) presses the switchhook, and (4) dials a directory number, a message will report that a new call has been originated using the Origination message rather than a series of individual messages reporting each subject action. Thus, as USTA points out, “the J-Standard provides alternative means to provide law enforcement with information that is consistent with” CALEA and is “cost-effective.”⁴⁹

4. Notification Messages for In-band and Out-of-band Signaling

Here again, the DOJ/FBI tries to apply the faulty logic that prior access to information creates a presumption “in favor of construing ‘call-identifying information’ to include” in-band and out-of-band network signaling.⁵⁰ The record demonstrates that signaling generated by this capability (*e.g.*, ringing, busy, or voice mail signals) does not constitute “call-identifying information.”⁵¹ In-band/out-of-band signaling has nothing to do with the telephone numbers dialed. Nor is it used to route calls. A busy signal, for example, does not identify the “termination” of a communication, since no communication has occurred. Moreover, ringing,

⁴⁸ *See, e.g.*, BellSouth Comments at 16-17; Cingular Comments at 9; CTIA Comments at 14-15; USTA Comments at 8.

⁴⁹ USTA Comments at 8.

⁵⁰ Remand Comments of DOJ/FBI at 26.

⁵¹ *See, e.g.*, BellSouth Comments at 18; Cingular Comments at 10; CTIA Comments at 17; USTA Comments at 9.

busy, and similar signals do not provide information about the “termination” of a call because “termination” refers to the final connection necessary to complete the circuit for a communication, not to the temporal end of the call. Thus, as used in the definition of “call-identifying information,” termination refers only to the telephone number to which a calling party is connected as a result of dialing an initial sequence of digits.

Here, again, the J-Standard serves as a viable and “cost-effective” alternative to the provision of this capability. The information sought under this “punch list” item is duplicative of other information already provided under the J-Standard. For example, the J-Standard provides for a Termination message that is delivered to law enforcement whenever a call is incoming to a subject. Included in the message is the number of the calling party, if it is available to the network. When a Termination message is received and the subject is not on the call, it is apparent to law enforcement that the subject’s phone is ringing and that the calling party is listening to audible ringback since this is how the telecommunications network is known to operate. It is a known fact that these events occur, and the network-generated tones that are being applied to the subject’s or associate’s line are obvious to law enforcement. Thus, there is no need to also require the development of this feature.

* * *

In sum, the Commission should not require carriers to provide the four “punch list” features. The record demonstrates that these capabilities do not fall within the scope of “call-identifying information” and therefore are not required by CALEA. Moreover, less costly means are readily available to assist law enforcement with its electronic surveillance.

V. THE DOJ/FBI'S DISCUSSION OF COSTS IS MISLEADING.

The DOJ/FBI's discussion of cost is disingenuous, not to mention misleading.

Throughout its discussion, the DOJ/FBI describes the cost of implementing CALEA (and the four "punch list" capabilities⁵²) as "remarkably small"⁵³ or "modest."⁵⁴ As demonstrated more fully below, nothing could be farther from the truth. Moreover, all of the rhetoric in the world will not turn the implementation of the four "punch list" items into an expense-free proposition, as the DOJ/FBI would have the Commission believe.

The DOJ/FBI invokes various tactics to hide the true cost of CALEA implementation. First, the DOJ/FBI tries to discredit earlier cost figures submitted by commenters by suggesting that these cost estimates were overstated.⁵⁵ Contrary to these assertions, the industry did not overstate its costs. The prior industry estimates were developed more than a year ago under very different circumstances (*e.g.*, prior to the nationwide buy-out and prior to the introduction of the FBI's flexible deployment option). Therefore, it is inappropriate to compare these previous estimates with today's costs. This misleading comparison is just one example of the DOJ/FBI's attempts to trivialize the significance of CALEA implementation costs. The Commission should

⁵² The DOJ/FBI makes the statement that "to the extent that hardware add-ons for dialed digit extraction are attributable to capacity requirements (*i.e.*, the volume of simultaneous intercepts that the carrier must be capable of handling under the capacity notices), carriers may seek reimbursement under the capacity provisions of the Department's cost recovery regulations." Remand Comments of DOJ/FBI at 40. To the extent that the DOJ/FBI construes "hardware add-ons" to include touch-tone registers for which it is required to provide reimbursement, such an arrangement could reduce the cost burden on carriers.

⁵³ Remand Comments of DOJ/FBI at 31.

⁵⁴ *Id.*

⁵⁵ See Remand Comments of DOJ/FBI at 39.

make no mistake – substantial costs that the DOJ/FBI has merely shifted or carefully disguised nevertheless remain.

Second, the government intentionally excludes carrier-specific implementation costs in order to paint a more optimistic picture. The DOJ/FBI's cost estimates, however, tell only part of the story. The DOJ/FBI states that "the cost of CALEA solutions provided under the cooperative agreements is borne entirely by the federal government."⁵⁶ This statement is a half-truth at best. The DOJ/FBI's figures only account for the software costs negotiated under certain nationwide buy-out agreements. Conspicuously absent from the government's estimates are the extensive carrier-specific development and installation costs. As BellSouth demonstrated in its comments, it will incur significant hardware, installation, and other costs to comply with CALEA.⁵⁷ Industry-wide carrier-specific costs will bring the total cost of CALEA compliance far above the totals set forth by the DOJ/FBI.

Moreover, it is important to note that the DOJ/FBI limits its cost figures to a narrow set of circumstances. Indeed, the DOJ/FBI's cost analysis is based on certain assumptions, including (1) consummation of the nationwide buy-out with all vendors; (2) successful negotiation of all carrier flexible deployment plans; and (3) exclusion of all carrier-specific costs for installation, hardware, and capacity. Thus, the government's cost figures incompletely reflect the "best-case" scenario. If these assumptions change, CALEA implementation costs will

⁵⁶ Remand Comments of DOJ/FBI at 39.

⁵⁷ As BellSouth demonstrated in its comments, it expects to incur costs in the following areas: Documentation, Method and Procedure Development; Telcordia Funding; Central Office Switch Order Preparation; Project Scheduling; Switch Generic and Switch Feature Testing; Technical Support; Switch Translations; Switch Generic Load Efforts; Switch Generic Load Costs (both software and hardware); BST and Vendor Engineering and Installation Costs; CALEA-specific Hardware Costs; Surveillance Administration Costs; and Maintenance and Administrative Upgrades to Systems.

necessarily increase. For example, if the DOJ/FBI rejects some flexible deployment plans thereby requiring carriers to accelerate or revise their schedules for installing CALEA-compliant equipment and software, these carriers will incur substantial generic and hardware costs not accounted for in the DOJ/FBI cost calculation.

BellSouth is one of the carriers whose flexible deployment plan is still under review by the DOJ/FBI and has yet to be approved, despite numerous amendments and BellSouth requests to discuss the plan. If BellSouth and the government do not arrive at a mutually acceptable agreement soon, BellSouth will not be in a position to meet the March 2001 compliance deadline, despite efforts to do so. Moreover, BellSouth's costs will most certainly increase because of the inability to deploy CALEA-compliant technical solutions in the normal course of business. This scenario, of course, represents only one carrier's experience. However, with 330 deployment schedules still under review by the DOJ/FBI,⁵⁸ there is a strong possibility that CALEA implementation costs could increase significantly for the entire industry.

The possibility of higher implementation costs cannot be dismissed lightly given the extremely limited government funds available to reimburse carriers. The DOJ/FBI makes much out of the fact that CALEA requires the government to bear certain implementation costs.⁵⁹ However, at this time, the total amount that Congress is authorized to appropriate for reimbursement is \$500 million, the bulk of which has already been obligated to be spent on CALEA software solutions as part of the nationwide buy-out. Therefore, it should be obvious to all that additional funds will be needed to reimburse those carriers required to install CALEA-compliant software and equipment outside of their normal generic upgrade cycles. To date,

⁵⁸ Remand Comments of DOJ/FBI at 42.

⁵⁹ See Remand Comments of DOJ/FBI at 39-40.

however, Congress has not appropriated any additional money, and no one, not even the DOJ/FBI, can guarantee that Congress will do so. Thus, the DOJ/FBI should not be allowed to write a check that cannot be cashed. More importantly, the DOJ/FBI should not be allowed to include a bill it may not be able to pay.

The DOJ/FBI attempts not only to disguise the true cost of CALEA implementation but also to minimize the nature of the Commission's role in evaluating such costs and their consequent effect on ratepayers.⁶⁰ The DOJ/FBI calls on the Commission to engage in a "modest and manageable form of weighing" costs.⁶¹ The DOJ/FBI's call for a dilution of the Commission's role is not only questionable but also inconsistent with CALEA. The statute explicitly requires the Commission to consider costs, cost-effective methods, and the impact on ratepayers when promulgating CALEA requirements.⁶² CALEA does not authorize the Commission to engage in a superficial or "modest" analysis that places the needs of law enforcement above all other considerations, including privacy protection and overall implementation costs. Indeed, as some members of Congress appropriately suggested, the Commission should determine "[w]hat methods best ensure that there will be no 'goldplating' either by the government or by industry seeking to have law enforcement pay for updating their networks."⁶³ Thus, the Commission is obligated to conduct a meaningful and thorough analysis of CALEA implementation costs.

The DOJ/FBI's attempts to minimize cost considerations, relegate the Commission to a subordinate role, and potentially burden ratepayers must be rejected as bad public policy. The

⁶⁰ See Remand Comments of DOJ/FBI at 45-46.

⁶¹ Remand Comments of DOJ/FBI at 46.

⁶² 47 U.S.C. §§ 1006(b)(1), 1006(b)(3).

⁶³ Additional Views of Don Edwards and Rick Boucher as reported in the House Report at 49.

record clearly shows that mandating the implementation of the four “punch list” items will add significantly and unnecessarily to the total costs of CALEA compliance, without any significant countervailing benefits. Accordingly, in order to fulfill CALEA’s mandate, the Commission should find that the “cost-effective” alternatives proposed by BellSouth and other parties comply with the assistance capability requirements of Section 103.

VI. THE COMMISSION SHOULD REJECT THE THREE NEW RULES PROPOSED BY THE DOJ/FBI.

The Commission should reject each of the three new rules proposed by the DOJ/FBI. The first proposed regulation seeks to “make clear that the Commission’s technical standards provide carriers with one alternative for meeting their assistance capability obligations.”⁶⁴ This suggested clarification is unnecessary. The DOJ/FBI essentially is asking the Commission to adopt a compliance standard by rule. However, the Commission is not authorized to adopt such regulation. CALEA itself establishes a “safe harbor” standard and neither the DOJ/FBI nor the Commission can modify or overrule it. As Section 1006(a)(2) states: “A telecommunications carrier shall be found to be in compliance with the assistance capability requirements . . . if the carrier . . . is in compliance with publicly available technical requirements or standards adopted by an industry association or standard-setting organization, or by the Commission”⁶⁵ Thus, CALEA speaks for itself, and no additional Commission rule is needed.

BellSouth also urges the Commission to deny the DOJ/FBI’s second proposed rule, which allegedly seeks to clarify that carriers are not compelled to deliver information to law

⁶⁴ Remand Comments of DOJ/FBI at 60.

⁶⁵ 47 U.S.C. § 1006(a)(2).

enforcement in the absence of lawful authorization.⁶⁶ This proposal represents another attempt by the DOJ/FBI to expand its electronic surveillance authority beyond that granted to it under the Title III and pen register and trap and trace statutes. Contrary to CALEA, its legislative history, and the DOJ/FBI's own stated intentions, the DOJ/FBI obviously wants the Commission to completely separate CALEA from established electronic surveillance law. However, the two are inextricably linked. Even FBI Director Freeh recognized this close relationship when he testified that the "purpose of this legislation, quite simply, is to maintain technological capabilities *commensurate with existing statutory authority*."⁶⁷ Thus, CALEA's requirements must necessarily be considered in the context of established electronic surveillance law. Law enforcement cannot obtain access to information that carriers must deliver pursuant to CALEA without the existence of a lawful Title III or pen register and trap and trace order. It is impossible to apply these laws in isolation of one another.

Finally, the DOJ/FBI's third proposal also must fail. The DOJ/FBI recommends that the Commission adopt a rule that would make the J-Standard's definition of "call-identifying information" subordinate to the Commission's decision regarding the "punch list" items.⁶⁸ This proposal is nothing more than a transparent attempt by the DOJ/FBI to protect its interests should the Commission decide not to add the four "punch list" items to the J-Standard – which it should not. As demonstrated above in Section II, neither the Court nor the Commission has found the J-

⁶⁶ See Remand Comments of DOJ/FBI at 60-61.

⁶⁷ *Digital Telephony and Law Enforcement Access to Advanced Telecommunications Technologies and Services: Joint Hearings on H.R. 4922 and S. 2375 before the Subcommittee on Technology and the Law of the Senate Committee on Judiciary and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 103rd Cong., at 7 (March 18, 1994) (testimony of Henry Freeh, Director, Federal Bureau of Investigation).

⁶⁸ See Remand Comments of DOJ/FBI at 61-62.

Standard's use of the term "call-identifying information" or its constituent parts (origin, direction, destination, termination) to be deficient. Therefore, the J-Standard's definitions should remain as they are regardless of the Commission's decision concerning the "punch list" items. Not only do the J-Standard's definitions of "call-identifying information" and its sub-parts faithfully track the statute, but the DOJ/FBI has failed to demonstrate a need to replace these definitions.

VII. CONCLUSION

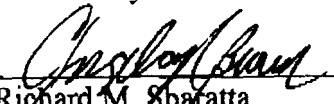
For all of the forgoing reasons, the Commission should not add the four "punch list" capabilities to the J-Standard. The J-Standard is not deficient and provides a "cost-effective" alternative that enables law enforcement to obtain the "call-identifying information" to which it is entitled under CALEA. Mandating the implementation of the four "punch list" items would impermissibly expand CALEA, infringe upon privacy rights, conflict with established electronic surveillance law, and impose significant and unnecessary costs on carriers, manufacturers, and ratepayers.

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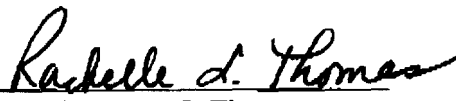
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December 8, 2000

CERTIFICATE OF SERVICE

I do hereby certify that I have this 8th day of December, 2000, served the following parties to this action with a copy of the foregoing **REPLY COMMENTS**, reference CC Docket No. 97-213, by hand delivery or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties as set forth on the attached service list.


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